

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
EUGENE A. DENIS,

Appellant,

Y.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB No. 85-35

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a notice and order of civil penalty of \$1,000 for allegedly maintaining an open fire containing prohibited material came on for formal hearing before the Pollution Control Hearings Board; Wick Dufford (presiding) and Gayle Rothrock, on June 28, 1985, in Vancouver, Washington. Board member Lawrence J. Faulk has reviewed the record.

Appellant Eugene Denis represented himself. Respondent Southwest Air Pollution Control Authority (SWAPCA) appeared by its attorney David Jahn.

1 Witnesses were sworn and testified. Exhibits were examined. From
2 the testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Respondent SWAPCA is a municipal corporation with responsibility
6 for conducting a program of air pollution prevention and control
7 pursuant to the Washington Clean Air Act, chapter 70.94 RCW, in a
8 multi-county area which includes Clark County, the site of the events
9 at issue in this case.

10 SWAPCA has, pursuant to RCW 43.21B.270, filed with this Board a
11 certified copy of its revised general regulation, as adopted and
12 amended, the contents of which are noticed.

13 II

14 Appellant Eugene A. Denis is a resident of Vancouver, Washington.
15 In connection with some business dealings, he obtained a substantial
16 amount of copper wiring. The wiring was covered with a
17 petroleum-based insulating material. In attempting to sell the
18 insulated wire, he discovered that he could get four times as much if
19 the insulation were removed. Therefore, he determined to burn the
20 insulation off and, then attempt to sell the uncovered wire.

21 III

22 Mr. Denis contacted a friend who owns some rural property near
23 Ridgefield and obtained permission to conduct some burning on this
24 site. The tract lies within Clark County Fire District No. 12.

25 Mr. Denis transported the insulated wire to his friend's property,

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-35

1 and waited for a dry clear day on which to burn. January 28, 1985,
2 was such a day and on that frosty morning, Mr. Denis commenced burning
3 the insulation. He did not attempt to obtain permission in advance
4 from SWAPCA or any other governmental agency.

5 IV

6 The fire produced dense black smoke which was observed by Fireman
7 William Bartel from his home about 45 minutes after the burning
8 began. He immediately left in a Fire District tanker truck kept at
9 his house thinking he might need to put the fire out. He located the
10 source of the smoke on an isolated site between Royle and Carty Roads
11 and drove the fire truck out into the field where the burning was
12 going on. There he observed perhaps a dozen piles of insulated copper
13 wiring, three of which were smoldering.

14 Mr. Bartel encountered Mr. Denis at the burn site and asked him if
15 he knew that the burning was illegal. Mr. Denis professed ignorance
16 of restrictions on open burning, but was completely cooperative with
17 Mr. Bartel and agreed to put the fire out. Forthwith, he did so.

18 V

19 Thereafter, Mr. Denis located a facility in Scapoose, Oregon,
20 which removes insulation from wire commercially. He had the wire he
21 had not burned processed there and testified that oil was recovered
22 from the insulation removed.

23 VI

24 SWAPCA after evaluating the fire district's report, issued a
25 Notice of Violation on February 4, 1985, asserting a violation of

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-35

1 Section 400-035 of SWAPCA's General Regulations for Air Pollution
2 Sources and of RCW 70.94.775. The Notice assessed a civil penalty of
3 \$1,000.

4 Mr. Denis timely appealed by letter received by the Board on
5 March 4, 1985.

6 VII

7 SWAPCA's control officer testified that the maximum penalty was
8 assessed because the burning was in violation of the statute (Clean
9 Air Act) itself, rather than an infraction only of the agency's
10 implementing rules. The policy adopted by his governing board is to
11 assess the maximum in such circumstances.

12 Mr. Denis has no record of prior violations.

13 VIII

14 Any Conclusion of Law which is deemed a Finding of Fact is hereby
15 adopted as such.

16 From these Findings of Fact the Board comes to these

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over the issues and parties. Chapter
20 43.21B and 70.94 RCW.

21 II

22 SWAPCA's General Regulations, Section 400-035 provides, in
23 pertinent part:

24 No person shall ignite, cause to be ignited, permit
25 to be ignited, or suffer, allow, or maintain any open
26 fire within the jurisdiction of the Authority, except
as provided in this Regulation.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB NO. 85-35

1 (1) Open Burning may be done under permit:

2 (a) Burning permits may be provided by the local
3 fire department, fire district or Washington
State Department of Natural Resources.

4 (b) No permit shall be issued unless the Control
5 Officer is satisfied that:

6 (i) No practical alternate method is
7 available for the disposal of the
8 material to be burned. (The Authority
has a written Open Outdoor Fire Policy
describing times, areas and kinds of
permitted open fires).

9 (ii) No salvage operation by open burning
10 will be conducted.

11 (iii) No garbage will be burned.

12 (iv) No animals will be disposed of by
burning.

13 (v) No material containing asphalt,
14 petroleum products, paints, rubber
products, plastic or any substance which
15 normally emits dense smoke or obnoxious
odors will be burned.

16 RCW 70.94.775 states, in pertinent part:

17 No person shall cause or allow any outdoor fire:
18 (1) containing garbage, dead animals, asphalt,
19 petroleum products, paints, rubber products,
20 plastics, or any substance other than natural
vegetation which emits dense smoke or obnoxious
odors...

21 III

22 We conclude that Mr. Denis' wire insulation fire on January 28,
23 1985, violated both Section 400-035 and RCW 70.94.775. The fire
24 contained petroleum products which are prohibited in an open fire.

IV

The Clean Air Act is a strict liability statute and, therefore, the violator's state of mind or intentions are irrelevant to the question of liability for penalties under its authority. However, such matters can be relevant to the issue of how much the penalty should be in any case.

V

RCW 70.94.431(1) allows the imposition of a civil penalty for violation of the Clean Air Act or its implementing regulations. The penalty shall be "in the form of a fine in an amount not to exceed one thousand dollars per day for each violation." The term "not to exceed" necessarily implies the use of judgment in determining how much the penalty should be in any instance.

The statute sets no explicit standards, but implicit in the penalizing function is an individualized consideration focusing on the seriousness of the violation and the behavior of the violator. The review procedures available provide a procedural safeguard against arbitrary action in penalty setting, Glascam Builders v. Yakima County Clean Air Authority, 85 Wn.2d 255, 534 P.2d 33 (1975), but the initial assignment of penalty by the agency should reflect a consideration of the circumstances and an attempt to select the level of sanction appropriate to change behavior and secure compliance.

SWAPCA has totally abdicated this function in every instance where, by its own interpretation, the statute itself has been violated. Simply to assess the statutory maximum in all such cases is

1 to evade a critical statutory responsibility. To disregard questions
2 of justice in the individual case endangers the integrity of the whole
3 effort to achieve clean air.

4 Accordingly, we conclude that in the instant case the agency
5 assessed the maximum penalty on an improper basis. Further, we
6 conclude, under all the circumstances, that the ends of the civil
7 sanction will be served by a penalty of substantially lesser amount.

8 VI

9 Mr. Denis has no previous history of violations and his subsequent
10 behavior and his testimony indicates that he is not likely to commit
11 further violations. The fire in question, however, was something
12 different from ordinary backyard burning. It was a salvage operation
13 for commercial gain involving materials which produce particularly
14 dense smoke. Weighing the seriousness of the offense, the behavior of
15 the violator, and objective of general as well as specific deterrence,
16 we conclude that the Order set forth below is appropriate.

17 VII

18 Any Finding of Fact which is deemed a Conclusion of Law is hereby
19 adopted as such.

20 From these Conclusions of Law the Board enters this
21
22
23
24
25

ORDER

The Notice of Violation is affirmed, but \$750 of the penalty is vacated. A penalty of \$250 is affirmed, but \$100 is suspended for a year on condition that the appellant commit no further violations of air pollution control requirements during that time.

DONE this 23rd day of July, 1985.

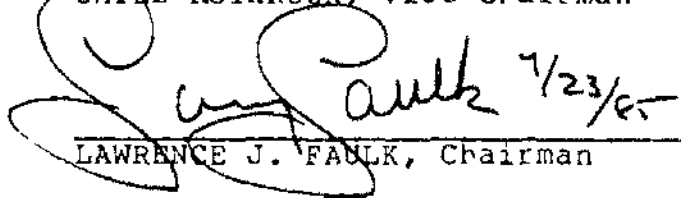
POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Lawyer Member



GAYLE ROTHROCK, Vice Chairman

 7/23/85

LAWRENCE J. FAULK, Chairman